

AO 243 (Rev. 09/17)

MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT
SENTENCE BY A PERSON IN FEDERAL CUSTODY

United States District Court	District Eastern District of Missouri
Name <small>(under which you were convicted):</small> ASHU JOSHI	Docket or Case No.:
Place of Confinement: FCC Forrest City, Arkansas	Prisoner No.: 48232-044
<div style="display: flex; justify-content: space-between;"> UNITED STATES OF AMERICA Movant <small>(include name under which convicted)</small> </div> <div style="text-align: center; margin-top: 5px;">V. ASHU JOSHI</div>	

MOTION

1. (a) Name and location of court which entered the judgment of conviction you are challenging:
U.S. District Court, Eastern District of Missouri

- (b) Criminal docket or case number (if you know): 4:18-CR-000876-JAR

2. (a) Date of the judgment of conviction (if you know): 09/16/2020
 (b) Date of sentencing: 10/07/2020

3. Length of sentence: 96 months and lifetime supervised release

4. Nature of crime (all counts):
Distribution of child pornography in violation of 18 U.S.C., Section 2252A(a)(2)(A). (Count 3)

5. (a) What was your plea? (Check one)
 (1) Not guilty ☐ (2) Guilty ☒ (3) Nolo contendere (no contest) ☐

 (b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, what did you plead guilty to and what did you plead not guilty to?

6. If you went to trial, what kind of trial did you have? (Check one) Jury ☐ Judge only ☐

7. Did you testify at a pretrial hearing, trial, or post-trial hearing? Yes ☒ No ☐

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8. Did you appeal from the judgment of conviction? Yes ☐ No ☒

9. If you did appeal, answer the following:

- (a) Name of court: _____
- (b) Docket or case number (if you know): _____
- (c) Result: _____
- (d) Date of result (if you know): _____
- (e) Citation to the case (if you know): _____
- (f) Grounds raised: _____

(g) Did you file a petition for certiorari in the United States Supreme Court? Yes ☐ No ☒

If "Yes," answer the following:

- (1) Docket or case number (if you know): _____
- (2) Result: _____
- (3) Date of result (if you know): _____
- (4) Citation to the case (if you know): _____
- (5) Grounds raised: _____

10. Other than the direct appeals listed above, have you previously filed any other motions, petitions, or applications, concerning this judgment of conviction in any court?

Yes ☐ No ☒

11. If your answer to Question 10 was "Yes," give the following information:

- (a) (1) Name of court: _____
- (2) Docket or case number (if you know): _____
- (3) Date of filing (if you know): _____

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- (4) Nature of the proceeding: _____
- (5) Grounds raised: _____

(6) Did you receive a hearing where evidence was given on your motion, petition, or application?

Yes ☐ No ☐

(7) Result: _____

(8) Date of result (if you know): _____

(b) If you filed any second motion, petition, or application, give the same information:

(1) Name of court: _____

(2) Docket of case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

(6) Did you receive a hearing where evidence was given on your motion, petition, or application?

Yes ☐ No ☐

(7) Result: _____

(8) Date of result (if you know): _____

(c) Did you appeal to a federal appellate court having jurisdiction over the action taken on your motion, petition, or application?

(1) First petition: Yes ☐ No ☐

(2) Second petition: Yes ☐ No ☐

(d) If you did not appeal from the action on any motion, petition, or application, explain briefly why you did not:
Waiver of appellate rights as part of plea agreement.

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12. For this motion, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground. Any legal arguments must be submitted in a separate memorandum.

GROUND ONE: Ineffective assistance of counsel - Unconstitutional application of federal law in violation of Due Process

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

1. Petitioner and the "victim" (M.D.) in this case are husband and wife who were declared legally married in the State of Kentucky on June 23, 2018 by State court order dated November 8, 2019.
2. In spite of their legal marriage, the government charged Petitioner with using his wife to create images of a sexual nature, distribute those images between themselves, and transport his wife across state lines with the intent to engage in sexual activity.
3. At all times relevant, Petitioner and his wife engaged in sexual activity considered legal under state law.
4. The federal pornography laws at issue are unconstitutional as applied to Petitioner because of the lack of a marriage exception.
5. In addition, the statute of conviction at issue is constitutionally vague, overbroad, and violates Due Process.
6. Defense counsel abandoned this viable constitutional claim during pretrial proceedings resulting in ineffective assistance of counsel.

(b) Direct Appeal of Ground One:

- (1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

- (2) If you did not raise this issue in your direct appeal, explain why:

(c) Post-Conviction Proceedings:

- (1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☒

- (2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

- (3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

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(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐

No ☒

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐

No ☒

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

Waiver of appellate rights in plea agreement.

GROUND TWO:

Ineffective assistance of counsel - The application of life supervised release is unjustified in this case.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

1. In addition to several non-standard or "special" supervision conditions, Petitioner was sentenced to lifetime supervised release.
2. While the Rule 11(c)(1)(C) plea in this case indicated that lifetime supervision was the statutory maximum, there is no indication that Petitioner would be sentenced to a life confinement sentence under supervision.
3. Defense counsel raised no objections and abandoned this valid sentencing issue. This was not based on strategy. It was apathy.
4. As a first-time offender wherein the Petitioner is still legally married to the "victim," lifetime supervision is overly broad and unjustified by 18 USC 3553(a).
5. It was plain error for the court to impose lifetime supervision.

(b) Direct Appeal of Ground Two:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐

No ☒

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(2) If you did not raise this issue in your direct appeal, explain why:
Waiver of appellate rights in plea agreement.

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☒

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☒

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☒

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☒

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

Waiver of appellate rights in plea agreement.

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GROUND THREE:

Ineffective assistance of counsel - Defense counsel failed, as a matter of law, to determine applicability of offense elements.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

1. The photographs of Petitioner and his wife at issue fail to meet or establish the elements required to be considered "child" pornography based on Dost Factors.
2. Defense counsel failed to address and distinguish the difference between the terms "minor" and "child" when applying the statute of conviction at issue.
3. The images used by the government fail as a matter of law to qualify as 'lascivious display of the genitals' as determined by Dost factors.
4. The second image at issue (1chwm...) was not "knowingly" distributed. Facebook's Snapshot feature automatically forwards an image - not an intentional act of distribution. Counsel failed to understand or challenge this.

(b) Direct Appeal of Ground Three:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

(2) If you did not raise this issue in your direct appeal, explain why:

Waiver of appellate rights in plea agreement

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☒

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☒

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☒

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☒

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(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

Waiver of appellate rights in plea agreement

GROUND FOUR: Ineffective assistance of counsel

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) Direct Appeal of Ground Four:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐

No ☒

(2) If you did not raise this issue in your direct appeal, explain why:

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐

No ☒

(2) If you answer to Question (c)(1) is "Yes," state:

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Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐

No ☒

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐

No ☒

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐

No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

Waiver of appellate rights in plea agreement

13. Is there any ground in this motion that you have not previously presented in some federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them:
Ground(s) One (1) thru Four (4) have not been presented in any court due to ineffective assistance of counsel.

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14. Do you have any motion, petition, or appeal now pending (filed and not decided yet) in any court for the judgment you are challenging? Yes ☐ No ☒

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised.

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At the preliminary hearing:
See case docket

(b) At the arraignment and plea:
See case docket

(c) At the trial:
See case docket

(d) At sentencing:
See case docket

(e) On appeal:
N/A

(f) In any post-conviction proceeding:
N/A

(g) On appeal from any ruling against you in a post-conviction proceeding:

16. Were you sentenced on more than one court of an indictment, or on more than one indictment, in the same court and at the same time? Yes ☐ No ☒

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes ☐ No ☒

(a) If so, give name and location of court that imposed the other sentence you will serve in the future:

(b) Give the date the other sentence was imposed: _____

(c) Give the length of the other sentence: _____

(d) Have you filed, or do you plan to file, any motion, petition, or application that challenges the judgment or sentence to be served in the future? Yes ☐ No ☒

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18. **TIMELINESS OF MOTION:** If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2255 does not bar your motion.*

This motion is timely filed. Petitioner was sentenced 10/7/2020 and did not file a direct appeal. Therefore, the conviction became final on 10/17/2020 - after the 10 day period to file a notice of appeal expired.

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2255, paragraph 6, provides in part that:

A one-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of –

- (1) the date on which the judgment of conviction became final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making such a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

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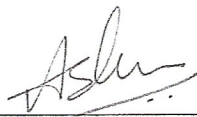
Therefore, movant asks that the Court grant the following relief:

Vacate the invalid sentence as it was imposed in violation of
Petitioner's Sixth Amendment right the effective assistance of counsel,
or any other relief to which movant may be entitled.

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Motion
under 28 U.S.C. § 2255 was placed in the prison mailing system on October 06, 2021
(month, date, year)

Executed (signed) on 10/06/2021 (date).



Signature of Movant

If the person signing is not movant, state relationship to movant and explain why movant is not signing this motion.